Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications	)	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

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ERRATA

The "Reply Comments Of National Association Of Counties, United States Conference Of Mayors, National Association Of Telecommunications Officers And Advisors, Texas Coalition Of Cities On Franchised Utility Issues, PROTEC, City Of Dearborn, Michigan, District Of Columbia Office Of Cable Television And Telecommunications, Montgomery County, Maryland, Prince George's County, Maryland, City Of St. Louis, Missouri, City And County Of San Francisco, and City Of Indianapolis, Indiana contained minor non-substantive typographical and textual errors. In addition I would direct your attention to pages 19, 23,27, and 29, on which certain minor substantive clarifications have been made. Accordingly, counsel requests that attached, complete and corrected copy of the Reply Comments, be substituted for the December 13, 1999 filing.

Respectfully submitted,

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In the Matter of Promotion of Competitive Networks in Local Telecommunications Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments	WT Docket No. 99-217
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REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF COUNTIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE TEXAS COALITION OF CITIES ON FRANCHISED UTILITY ISSUES, PROTEC, THE CITY OF DEARBORN, MICHIGAN, THE DISTRICT OF COLUMBIA OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS, MONTGOMERY COUNTY, MARYLAND, PRINCE GEORGE'S COUNTY, MARYLAND, THE CITY OF ST. LOUIS, MISSOURI, THE CITY AND COUNTY OF SAN FRANCISCO, AND THE CITY OF INDIANAPOLIS, INDIANA

ERRATA
December 14, 1999

SUMMARY

The Commission has chosen the current Notice of Inquiry[1] to question the responsibilities and obligations of local governments in managing and receiving compensation for use of public rights-of-way. It is time to bring this Inquiry to a close.

Commenters failed to raise substantial examples of local government abuses. The federal Constitution prevents the Commission from commandeering local regulation and from giving private industry precious local government property rights. The Communications Act states emphatically that local governments enjoy a "safe harbor" in managing rights-of-way and establishing compensation regimes for their use. And the Commission has no competence, let alone legal authority, to seriously consider local taxation regimes.

Right-of-Way Management is a Core Local Government Function. The nature of the industry comments indicates that the Commission is being encouraged to force local governments to abandon their fundamental responsibility to protect the public's health, safety and welfare. Rights-of-way are at the core of every community's economic, social and cultural existence. It is not a matter for federal concern. It is a matter of the most intense local concern.

It is no surprise that private enterprises chafe under rules that protect the public health, safety and welfare and fiscal interests of the taxpaying public. But public right-of-way management is a "core function" of local government. Multiple demands by competitive

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[1] Promotion of Local Competitive Network Local Telecommunications, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, (Released July 7, 1999). (Hereafter "NOI").

providers for access to the public rights-of-way in different locations cannot be resolved by a remote federal regulatory agency that has no civil, traffic, or hydraulic engineer on its staff.

There is no single right-of-way management plan that encompasses construction, maintenance, make-ready, undergrounding, space allocation, restoration and fee requirements that will meet the unique needs of every different local jurisdiction.

Section 253 restricts the Commission's authority and creates a "safe harbor" for local government right-of-way management and compensation regimes. Section 253(c) explicitly preserves the authority of "local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis . . . ." Local requirements which fall within this safe harbor are protected from federal interference even if the requirement might otherwise be deemed a prohibitive barrier to entry under § 253(a).

Industry comments attack local requirements that are clearly within the embrace of § 253(c). Most of the requirements cited are legitimate functions of right-of-way management. These include requirements such as restrictions on explosive propane gas generators on city streets, facility mapping, excavation and construction permits, time and manner restrictions on repeated street cuts, and ascertaining the technical and financial qualifications of a subcontractor of a provider granted generally unsupervised access to the public right-of-way. Each of these is within the scope of the § 253(c) "safe harbor".

Nor does § 253(a) authorize preemption of every local government requirement not expressly protected by § 253(c). A local government regulation is still a legitimate exercise of sovereign authority and cannot be preempted unless it can be determined that it "may prohibit or have the effect of prohibiting" competitive entry.

There is no evidence in the docket that local government right-of-way management and compensation is impeding competitive entry. No substantive, meaningful or reliable evidence has been presented by the industry comments to support their claims that local governments are troglodytes impeding the development of competitive networks. A handful of unverifiable anecdotes does not create a federal case. Most commenters failed to provide any specific examples of local government prohibiting or having the effect of prohibiting entry into the local market. By contrast, comments from local governments in Minnesota and Colorado presented specific evidence to demonstrate that limited or restricted local right-of-way management authority has not accelerated growth in the development of competitive networks.

The Commission should follow the intentions of Congress on the issue of local compensation for use of rights-of-way. The industry desperately seeks Commission assistance in ordering a subsidy from local governments to encourage the expansion of competition. The industry's preferred form of a subsidy is to receive free—or nearly free—use of public rights-of-way. The Commission's own precedents in spectrum auctions and in cost methodologies for joint and common carrier facilities belie the wisdom of this approach. The industry abandons basic principles of economics and efficient resource allocation as it argues that public right-of-way is a "free good" that merits no compensation for its value, or for inchoate use.

The text and legislative history of § 253(c), as well as relevant takings case law all support a reading of § 253(c) that entitles local governments to the collect *fair market value* of – not just the costs associated with managing – the public rights-of-way. Local compensation requirements cannot be limited to cost-based formulations without raising significant problems under the Fifth Amendment to the Constitution. Furthermore, physical occupancy and trespass are not the only "uses" of real property.

The Commission has no authority to modify, impair or supersede State and local tax laws. The Commission itself has previously held that disputes about local taxes should be settled in state courts. Taxation is a cost of doing business in America. The telecommunications industry is not entitled to a wholesale exemption from State and local taxes. Furthermore, the existence of State and local taxes does not evidence that State and local tax policy prevents or impedes any provider from entering a local market.

TABLE OF CONTENTS

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ERRATA
December 14, 1999

I. INTRODUCTION

The Commission recently observed that "spectrum management is one of the Commission's core functions."[2] It is just as evident that right-of-way management is a "core function" of local governments. The Commission's further observation on spectrum management applies with equal force to local government's role in managing public rights-of-way:

> This core function would continue unabated despite dramatic changes in the U.S. communications industry. In fact, increasing demand generated by new services in a more competitive environment will make this function increasingly important and more difficult.[3]

The Commission has chosen the current Notice of Inquiry to bring to the fore fundamental questions regarding the responsibilities and obligations of local governments in managing public rights-of-way. The comments filed reveal the tensions that naturally arise with surging demand for a scarce and valuable resource which is necessarily devoted to multiple and sometimes conflicting uses. It is no surprise that private enterprises chafe under rules that protect the public health, safety and welfare and fiscal interests of the taxpaying public.

Local governments share the Commission's commitment to increased competition and the economic benefits of advances in telecommunication services and technologies. Local governments expect as well that the Commission shares our commitment to efficient, effective

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[2] *In the Matter of Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, FCC 99-354, ¶ 6 (November 22, 1999).

[3] *Id.*

and localized regulation of the public rights-of-way for the benefit of our local communities and the people who live and work there.

Every issue raised in this proceeding reduces finally to the question of how to balance the legitimate needs and interests of local communities and the economic and operational demands of private enterprise. More fundamentally, the NOI asks which agents of the people, at what level of government, are best situated to evaluate and balance those competing interests.

We believe that public right-of-way management has developed as a core function of local government for the simple and undeniable reason that only local government is in a position to solve these problems. Industry requirements, as well as community interests, are unique to each community, and the balance of those requirements and interests is also necessarily unique to each community. Different communities attract different competitors with different service plans, and different levels of intensity of competition and right-of-way demand, based on population density and the economic characteristics of the community. Community interests are different in every community based on a variety of factors, including historic development patterns, the zoning of economic, cultural and residential activity, and even topography, climate and soil conditions. There is no one national solution to any of the issues raised by the industry in the initial comments filed in this proceeding. And no one set of rules can be devised to address these issues on a wholesale basis.

Concern that local governments are inclined to thwart competition and the progress of technology is simply an illusion. Every local government is as anxious as each industry commenter in this proceeding to see that local constituents receive the benefits of the services that the industry wants to deliver to those constituents. The "political economy" is as effective at local levels as any "market economy" in assuring that consumers get the services that they want. Local elected or appointed officials that establish arbitrary or secondary barriers to competition will be punished by local voters. At the same time, the local political economy is decidedly more effective and more responsive, than a federal agency could possibly be in assuring that competing community interests are also addressed. Traffic, snow removal and even utility cut problems arising from failed right-of-way management programs are high-visibility issues in local mayoral and city council elections. And just as important are new industries and jobs and cheaper ways of doing business that give one community a competitive advantage over another.

More importantly, right-of-way activities that are not properly managed threaten real economic and personal injury -- even loss of life. Natural gas explosions and subterranean floods of retail space, disruption of water supplies, sewage systems and electrical service are significant safety and economic risks that attend the installation and maintenance of telecommunication and other utility facilities in public rights-of-way. Local governments and their constituents bear those risks. Unless the federal government is inclined to underwrite those risks, local governments must have full authority to contain them.

We address below, the legal constraints on the Commission's authority with respect to local right-of-way regulation, and the specific complaints cited by industry commenters in this proceeding. But the Commission should bear in mind throughout that the historical role of local governments in managing public rights-of-way is not an historical anomaly. It is a necessary feature of the sensible allocation of rights and responsibilities in our federal system of government. Local right-of-way management and resource allocation is intensely local in both its determinants and consequences.

II. THE LIMITS OF FEDERAL AUTHORITY

By enacting the Telecommunications Act of 1996, Congress intended generally "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[4] In service of that policy, the Act preempts state and local protectionist legislation and regulation in specific and narrow terms:

> (a) In General.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[5]

As a result of Commission and Congressional efforts to extend telecommunications competition (which local governments welcome), the landscape of telecommunications service has changed dramatically. Locations long-served by a single carrier, who worked informally with local authorities to manage the right-of-way and extend service, are now visited, in direct proportion to the promised benefits of competition, with surging demand for access to public rights-of-way in order to bury and hang cable and fiber telecommunications facilities and to construct wireless antenna facilities. The interests of competing carriers in access to the right-of-way are not always congruent with each other or with the legitimate interests of local governments and their citizens. The interests and demands of competing carriers and local citizenry must be reconciled.

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[4] H.R. Conf. Rep. No. 104-458, at 1 (1996).
[5] 47 U.S.C. § 253(a).

Thus, the immediate, direct and inevitable result of the federal multi-provider policy is to require more active right-of-way management than ever. Local governments have responded by asserting appropriate right-of-way management authority.[6] This parallels and supports the federal efforts to encourage facility-based competition. Local activism in this area is necessary to extend and to sustain competition. It is neither a "know-nothing" rejection of the benefits of competition nor a guerrilla insurgency to protect incumbent monopoly carriers. Industry portrayals in this proceeding could not be more mistaken.

Congress was clearly aware of the need to manage right-of-way access, which became more acute with the advent of multiple providers competing for space in the public rights-of-way. And Congress knew – and stated – that, as a practical matter, no other government entity could supplant local authorities in the essential task of managing access to the public right-of-way. Moreover, Congress understood that the public right-of-way represented a valuable public asset – held in trust for local taxpayers by local government, and that local communities were entitled to receive "fair and reasonable compensation" for the use of the right of way.

To those ends, Congress limited the general preemptive effect of § 253 by providing at subsection (c):

> State and Local Government Authority.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

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[6] What McLeodUSA calls a "flood" of new ordinances. Comments of McLeodUSA at 1.

The *specific* legislative intent underlying § 253(c) limits the more *general* legislative intent alluded to above. Properly understood, this means that so long as the local regulatory scheme is in the service of local authority to manage the right-of-way, it is not preempted. It is not preempted even if it would otherwise violate the general preemptive edict of § 253(a) by prohibiting the offering of telecommunications service. Section 253(c) is an explicit Congressional instruction as to how § 253(a) is to be construed. And the preservation of the local governments' management authority is literally subject to no qualification. If the regulation is within the local government's state law authority to "manage the public rights-of-way," then subsection (a) does not apply. Period. Any preemption by implication is precluded by Section 601(c) of the 1996 Act:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[7]

Section 601(c) sharply limits the Commission's authority to preempt local right-of-way access requirements. Although the Supreme Court has recognized three types of preemption -- conflict preemption, field preemption, and express preemption[8] -- the Commission's authority is unqualifiedly constrained. If Congress did not explicitly state an intent to displace state and local law in the statute's language, then the Commission may not assume that authority in its rulemaking capacity.[9]

In the field of right-of-way access management, Congress has specifically addressed and

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[7] 47 U.S.C. § 152 nt.
[8] *See, Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992).
[9] *See, Cipollone*, 505 U.S. at 516.

delimited the respective roles of federal, state and local government. Even to whatever slight extent the language of the statute is open to interpretation, the Commission must "start with the assumption that the historic police powers of the States were not to be superseded by [a federal act] . . . unless that was the clear and manifest purpose of Congress."[10] The presumption in favor of local authority extends as well to the construction of an express preemption. In *Cipollone*,[11] the United States Supreme Court rejected the view that the presumption should apply only to the question whether Congress intended any preemption at all, as opposed to questions concerning the scope of the intended preemption.

In light of the presumed preservation of local police powers, together with the legislative command of § 601(c), § 253(a) can only be read to preempt local franchise requirements which both fall outside of the safe harbor of § 253(c), and which actually "may prohibit or have the effect of prohibiting" new entrants from providing telecommunication services. Thus, even without the benefit of the safe harbor provided by § 253(c), a local right-of-way access requirement can only fall within the language of § 253(a) if it in fact operates to exclude new entrants, because the requirement cannot be met. Moreover, the safe harbor of § 253(c) must be given its full effect as a constraint upon the Commission's authority to preempt under § 253(a). Thus, even a requirement that might be deemed prohibitive is nonetheless within the discretion of local authorities if it is directed to the management of right-of-ways or the requirement of fair and reasonable compensation.

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[10] *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947); *Hillsborough City., Hillsborough County v. Automated Medical Laboratories,* 471 U.S. 707, 715-716 (1985).

[11] *Cipollone*, 505 U.S. at 545-546.

AT&T v. Iowa Utilities Bd.,[12] stands in opposition to a broader grant of federal authority with respect to local right-of-way management and compensation arrangements. *Iowa Utilities Bd.*, insists that Congress must give explicit legal authority to the Commission to overcome the general prohibition on Commission jurisdiction contained in § 152(b). *Iowa Utilities Bd.*, did accept the Commission's general rulemaking authority under § 201(b) because §§ 251 and 252 of the 1996 Act "clearly 'apply' to intrastate service."[13] There the § 152(b) limitation on the Commission need not be "construed to apply . . . when the explicit language of §§ 251 and 252 gave the Commission jurisdiction."[14]

Here, however, with respect to the abrogation or interference with local right-of-way management authority, there is no need to resort to § 152(b) as a limit upon the reach of the Commission's rulemaking authority. The limitation Congress put in place on the Commission is explicit and unambiguous. So even if § 201(b) may provide the Commission with rulemaking authority that is not explicitly granted, § 201(b) surely cannot supply a rulemaking authority that is explicitly withheld. In other words, § 201(b) cannot expand the Commission's authority when the sole substantive source of that ostensible authority with respect to local requirements is expressly limited. Section 253, in sharp contrast with §§ 251 and 252, is expressly limited in its application by § 253(c) ("Nothing in this section affects . . .").

In addition, the Court in *Iowa Utilities Bd.*, noted a distinction between the application of the Act and the Commission's jurisdiction under the Act, and recognized that "'Commission jurisdiction' always follows where the Act 'applies,'" and that "'ancillary' jurisdiction" could exist

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[12] 525 U.S. 366, 119 S.Ct. 721, 730 (1999)
[13] *Id.* at 730.

even where the Act does not 'apply'."[15] With respect to right-of-way management, however, the Act does not "apply," and the Commission's jurisdiction is plainly withheld by § 253(d). Section 253(d) starkly omits from the express grant of jurisdiction to review state and local requirements those which are within the ambit of § 253(c).

Applying these basic considerations of federalism and the limits upon the Commission's preemption authority, it is clear that many, indeed most, of the telecommunications carriers' demands for new Commission rules to limit local authority are not plausibly within the Commission's power. These include demands that the Commission impose a time limit on the consideration of construction permits;[16] that it preempt local right-of-way regulation which is not explicitly authorized under state law;[17] that it preempt local regulation regarding placement of back-up power supplies in the right-of-way;[18] and that it preempt requirements that carriers provide maps of facilities occupying the right-of-way.[19]

Any Commission preemption of local right-of-way regulations faces a further constitutional problem. The Supreme Court has stated there are significant limits to federal authority to "commandeer" state and local authority to regulate in a manner directed by federal authorities. It is difficult to see how Commission mandates on local governments to regulate right-of-way in

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[14] *Id.* at 731.

[15] *Id.*

[16] *See e.g.,* Comments of Association for Local Telecommunications Services at 26 [ALTS]; Comments of RCN Telecom Services at 10.

[17] *See e.g.,* Comments of ALTS at 26; Comments of Cox Communications at 5.

[18] Comments of Cox Communications at 44.

[19] Comments of GTE Service at 9; Comments of SBC Communications at 7, 13; Comments of MediaOne at 4-5.

particular ways would not violate this "anti-commandeering doctrine." According to Justice O'Connor in *New York v. United States,*[20] "the allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[21] The Court recognized that Congress may enlist local cooperation by conditioning the availability of federal funds, or by requiring that a state must regulate according to federal standards if it regulates at all.

> By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.
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> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.[22]

However, in the context of local right-of-way management, the choices are not so stark and simple. Local governments cannot simply cede regulatory authority to a federal agency that has no ability in any event to manage local right-of-way access in any useful or meaningful fashion. Congress properly recognized in § 253(c) that local government was the only candidate

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[20] *New York v. United States,* 505 U.S. 144 (1992).
[21] *Id.* at 166.
[22] *Id.* at 178.

for the role of managing right-of-way access. A traditional and essentially local government function, the authority to manage right-of-way access is necessarily local. The issues presented by multiple demands for access to the right-of-way in different locations are not amenable to a national solution. There is no one set of optimal construction, maintenance, make-ready, undergrounding, space allocation, restoration or insurance requirements. Even less is there one point of perfect balance of conflicting interests in every community on the continuum between unrestrained and unregulated access to the right-of-way in support of infrastructure and economic development on the one hand, and the mindless preservation of an out-moded government-sponsored monopoly on the other hand.

The Commission should make it clear, once and for all, that local governments need discretion to tailor the incentives and burdens of infrastructure development in light of factors that are specific to each local market. This process must operate free of Commission intrusion. Certainly the Commission cannot second-guess an open political process at the local level that reasonably balances the full range of community interests in telecommunications competition and other demands on the precious resource of public right-of-way.

III. THE COMMENTS HAVE FAILED AT THE THRESHOLD TO DEMONSTRATE THAT LOCAL REGULATIONS ARE PROHIBITING ENTRY INTO LOCAL MARKETS.

We commend the Commission's efforts to gather information regarding the still unsubstantiated industry claims that state and local governments are impeding competitive entry into local markets by enacting management ordinances directed to their increasingly popular rights-of-way. We submit that the comments filed in this proceeding do not begin to demonstrate that local impediments to competition are serious, pervasive or persistent.

The evidence offered by the carriers is purely anecdotal, and the anecdotes are largely insubstantial. Viewed in the context of hundreds of local authorities attempting to manage the exploding demand for right-of-way access, the evidence arrayed by the industry only confirms the common-sense conclusion that local governments are overwhelmingly anxious to foster competition and speed the "deployment of advanced telecommunications and information technologies" to their constituents in keeping with the purpose Congress sought to advance with the 1996 Act.

A review of the industry comments reveals a lack of substantive, meaningful and reliable evidence to support their claims that local governments are impeding entry into the local markets. While some commenters have provided a handful of anecdotes, others have failed to provide even one specific example of an instance in which it has experienced a local government impeding their entry into the local market.[23]

In addition, many of the local governments about which the industry commenters complain are not identified so that the complaints can be evaluated and addressed. The comments of industry participants and organizations are replete with references to requirements of "some local governments" or "a city in Virginia." For example, Cox Communications complains that "some LFAs" as well as "one major U.S. city" impose "arbitrary, discriminatory or burdensome regulations on Cox," but fails to identify by name any of those local franchising authorities.[24] The unsubstantiated accusations against unidentified local governments makes it

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[23] *See e.g.,* Comments of Global Crossing; Comments of Florida Power and Light; Comments of Metricom; Comments of RCN Telecom Services; Comments of Level 3 Communications.

[24] Comments of Cox Communications at 7. *See also e.g.,* RCN Telecom Services at 5 ("many local authorities"); Comments of MediaOne at 7 ("one major city"); Comments of Global

impossible to determine the exact nature of these regulations and to respond to the comments. It also makes it impossible for the Commission to evaluate those complaints in any meaningful way.

Moreover, viewed on a purely quantitative level, the total number of different jurisdictions that are even mentioned in industry comments as examples of problematic regulatory regimes is statistically insignificant. Even assuming that each of the regulations cited is an example of a burdensome local government regulation, these isolated anecdotes do not establish the existence of a widespread pattern of local regulations which are prohibiting entry into the local markets. The number is so small as a percentage of the total number of local jurisdictions that manage right-of-way that the comments cannot be credited with having identified a real market failure. At most, a few of the comments raise transitional questions as the particular jurisdiction negotiates and rebalances the various factors it must consider. The industry comments have certainly not identified a problem of sufficient dimension to warrant an unprecedented federal intervention in local government policies.

The record before the Commission only underscores the Commission's observation that "most communities and carriers have arrived at solutions that both protect State and local governments' authority to manage public-rights-of-way and avoid imposing unreasonable or discriminatory burdens on competitive service."[25]

A close review of the local regulatory requirements offered up by the industry reveals not one that even arguably "may prohibit or have the effect of prohibiting" the provision of

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Crossing, at 4-5 ("state and local governments"); Comments of GTE Service at Appendix A ("City in Virginia").

[25] NOI at ¶ 79.

telecommunications service. Not a single industry commenter can claim that it has been prohibited from entering a local market.

Telecommunications providers do not base their decisions to enter a particular market on local government policies in that area, but on the attractiveness of the market involved.[26] The factors that principally drive market entry decisions are population density and wealth. In fact, one need only take a look at the comments to illustrate this point.

One example is Maryland Heights, Missouri. The Association for Local Telecommunications Services complains that Maryland Heights imposes right-of-way fees that exceed costs.[27] Those fees, however, have done nothing to discourage entry. The City currently has right-of-way agreements with six different telecommunications providers, all of which are currently offering service to the City's residents, and some of which have been doing so for as long as 4 years.

In contrast, in 1996 the Colorado Legislature enacted legislation that eliminated the franchising authority of local governments.[28] In addition the law purported to eliminate the requirement of any franchise fee or rental for private corporate use of public streets.[29] The logic of industry commenters, given the fact that competitive telecommunications providers have had franchisee-free and rent free use of Colorado local rights-of-way over the last three years, suggests that the development of competition in the local markets throughout Colorado would be

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[26] *See,* Comments of Local Gov't Coalition at 6-9.

[27] Comments of ALTS at 19 n.31; *See also* Comments of Cablevision Lightpath and Nextlink Communications at n.19.

[28] 38-5.5-101(2)(b) C.R.S. *See* Comments of Colorado Municipal League at 3 for the legislative history of this statute.

well ahead of other states. However, the Commission's Local Competition Report[30] reveals that, as of the second quarter of 1999, the number of local service competitors holding local service codes[31] in Colorado is 13, while the number of local service competitors holding local service codes in New York is 24, in California 28, and in Missouri 12.[32]

Similarly, Minnesota limits local government compensation for rights-of-way to the "actual costs a local government unit incurs in managing its public rights-of-way ...."[33] However, only twenty-seven of the eighty-two competitive local exchange carriers certified to provide service in Minnesota are actually offering service.[34] In addition, as of the second quarter of 1999, there are only 12 local service competitors holding local service codes in Minnesota.[35]

These examples illustrate that the level of compensation charged for access to the right-of-way has no meaningful relationship to the occurrence of new entry. Local compensation arrangements based on the value of the property interest used by the new entrant does not operate to prohibit new entry. If there was a significant, real, statistically demonstrable relationship between right-of-way access compensation requirements and competitive entry, the industry had its chance to prove it. The industry has unique access to the evidence required to establish a connection between government-imposed entry costs and the intensity of competition in discrete

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29 38-5.5-107(1) C.R.S.

30 The Commissions Report titled Local Competition Report: August 1999 is the first update to the Local Competition Report released by the Industry Analysis Division in December of 1998.

31 Assignment of a numbering code in a particular area does not indicate that the carrier assigned the code is providing service in the area. However, if a reserved code is not activated within eighteen months the code is released from reservation.

32 FCC Local Competition Report: August 1999, Table 4.1.

33 *See*, Minn. Stat. § 237.163(6)(a) for a description of costs included in "actual costs."

34 Comments of Northern Suburban Communications Commission at 13, Attachment A.

markets. Their failure to adduce that evidence can only be taken to suggest that the claimed connection is not demonstrable.

IV. THE LOCAL GOVERNMENT REGULATORY REQUIREMENTS IDENTIFIED BY INDUSTRY COMMENTERS ARE PROTECTED BY THE SAFE HARBOR OF SECTION 253(C) AND DO NOT IN ANY EVENT OPERATE TO PROHIBIT ENTRY IN VIOLATION OF § 253(A).

As discussed above, § 253(c) explicitly preserves the authority of "local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis . . . ." Local requirements which fall within this safe harbor are protected from federal interference even if the requirement might otherwise be deemed a prohibitive barrier to entry under § 253(a).

Despite the imprecations of some industry commenters, right-of-way management authority cannot be confined to coordinating street cuts and setting up "Detour" signs. The needs of the local communities, the different physical characteristics of each community's rights-of-ways, and the differences in local infrastructures must be taken into consideration when setting right-of-way regulations and compensation requirements. The needed variations are almost as numerous as the number of local communities themselves. These differences make it impossible to efficiently and effectively manage public rights-of-way across the country under regulations drawn up in Washington, D.C.

Senator Kempthorne pointed to his own experience during debate on amendments to S.652 (the Senate bill which later became the Telecommunications Act of 1996): "When I was the mayor of Boise, ID, we had a particular project that on the main street,

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[35] FCC Local Competition Report: August 1999, Table 4.2.

on Idaho Street, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I tell you, Mr. President, that there is no way in the world that the Commission, 3,000 miles away, could have coordinated that."[36]

In addition, as owners and trustees of public property, local governments have a legal and political responsibility to manage public property for the highest and best public good. They have an obligation to protect the public investment in public rights-of-way and accompanying infrastructure, to balance competing uses of this public resource, and to receive fair and reasonable compensation from the use of public resources by private interests. Efficient economic pricing requires that the right-of-way be valued in a manner that encourages its highest and best use. At the same time, local governments are also charged with the duty to ensure that this use does not unnecessarily inconvenience, threaten the safety of, or impose uncompensated costs on its citizens.

Local government regulation and fair pricing is necessary to efficiently allocate a valuable and scarce resource such as local rights-of-way and to balance the competing interests of all right-of-way users. Local governments must be permitted to continue to regulate and to price their local rights-of-way, and must be permitted to do so in a manner that ensures the most efficient use of the valuable and finite economic resource. The industry comments object to the costs associated with reasonable right-of-way management and compensation. The fact remains that fair market prices and reasonable rules are not barriers to entry or impediments to

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[36] 141 Cong. Rec. S 8173 (*daily ed.* June 12, 1995).

competition. If reasonable rules aren't adopted and enforced, then the right-of-way will be in chaos. And none of the infrastructure installed by the new entrants will be safe from disruption! Further, public right-of-way is not an economic "free good". In fact, the suggestion that charging for the use of property is somehow a barrier to entry is inconsistent with the Commission's own accepted principles of Total Long Run Incremental Costs (TLRIC) pricing. The best, most efficient, and fairest method of allocating this scarce resource is to charge "fair market value" for its use. Competitive principles for sustainable competition in telecommunications markets require that all users pay a portion of the value of the joint and common right-of-way infrastructure.[37]

The Commission established this principle when it used auctions to recover part of the value of the electromagnetic spectrum used by cellular companies and other wireless carriers. The Commission explicitly found that market value pricing enhances development of a competitive market, and ultimately reduces costs by encouraging the most economic allocation of resources.[38] In its Report to Congress on Spectrum Auctions (October 1997), the Commission explained that "the radio spectrum is a resource that is limited in supply and able to sustain only a certain number of users at any one time despite the technological advances that have dramatically improved the ability to use spectrum more efficiently over time."[39]

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[37] Implementation of Local Competition Provisions of the Telecommunications Act, CC Docket No. 96-98, *Order on Reconsideration,* 11 FCC Rcd 13042; 1996 FCC LEXIS 5394; 4 Comm. Reg. (P & F) 1057 (Released September 26, 1996).

[38] Implementation Of Section 309(J) of the Communications Act--Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348, 75 Rad. Reg. 2d (P & F), ¶ 5 (released April 20, 1994) (*hereafter "Second Report and Order"*).

[39] *The FCC Report to Congress on Spectrum Auctions*, Docket No. 97-150, p. 6 (Released October 9, 1997).

So too, the public right-of-way "is a resource that is limited in supply and able to sustain only a certain number of users at any one time." Access to the right-of-way should also be allocated efficiently through a market price mechanism. The Commission should not deny to local governments the benefits of sound economic principles which it has embraced in its own policies and procedures. The Commission should publicly encourage state and local governments to pursue pricing mechanisms for rights-of-way that will assure their highest and best use—through prices that encourage the best allocation of this precious local resource.

A. Most of the Local Government Requirements Identified by Industry Commenters are Plainly Protected by § 253(c).

Industry commenters have generally advocated a narrow construction of local right-of-way management authority under § 253(c). Even accepting the assertion that management power must be exercised only over matters directly impacting the rights-of-way -- i.e. "physical occupation issues," most of the local requirements that industry commenters identify as objectionable are clearly within the embrace of § 253(c). [40]

For example, one company takes issue with local government attempts to impose certain restrictions on the placement of propane generators within their rights-of-way.[41] Cox Communications claims that the attempts of local governments to restrict the size of gas generators or to forbid the placement of such generators in specific locations within the right-of-

[40] *See e.g,* Comments of Cox Communications at 4; Comments of Cablevision Lightpath and NextLink Communications at 11.
[41] Comments of Cox Communications at 8-9.

way have "unreasonably delayed or burdened" its "upgrading of its cable facilities to provide advanced service." [42]

The Commission cannot seriously entertain the argument that local government regulations concerning the placement of flammable and potentially explosive equipment in a public rights-of-way is not a matter within the scope of appropriate right-of-way management. Cox does not even pretend that the issue is not related to right-of-way management, but nonetheless urges the Commission to preempt the requirements because they are burdensome or costly for Cox. Acknowledging that the safety concern is not an illusion, Cox claims that it "takes extra precautions to ensure safe operation of these units."[43] However, it is the local government and not Cox that is charged with protecting the safety of its citizens.

SBC Communications[44] cites a facility mapping requirement in a local right-of-way management ordinance as an example of what it describes as "redundant 'third tier' regulation which reaches beyond traditional rights-of-way management." SBC complains[45] that the City of Irving, Texas requires a carrier to provide maps and drawings of its facilities as they are located in the City's rights-of-way.[46] It is hard to conceive of a right-of-way management responsibility that is more basic than knowing where in the right-of-way facilities have been installed.

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[42] Comments of Cox Communications at 7.

[43] Comments of Cox Communications at 8.

[44] Comments of SBC at 7.

[45] Comments of SBC at 7.

[46] *See*, Code of Civil And Criminal Ordinances City of Irving, Texas, Part II The Code, Chapter 34A Right-Of-Way Management, Article I. General Provisions, Section 10 "Plans of record" plans.